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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-869

KEITH ROBERTS,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

Petition for Rehearing Pursuant to Rule 58(2)

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on March 22, 1976, and (2) granting the petition. As grounds for this petition for rehearing, petitioner states the following:

I. The question presented here is whether Board Order No. 69-8-68 of September 12, 1969, which was held invalid by the Court of Appeals *was void?*

This question, which is both substantial and controlling was *not* presented in the Petition, as it is based on facts not previously available for inclusion in said Petition.

II. *The Grant of Certiorari in Nader v. Allegheny Airlines, Inc., No. 75-455, October Term, 1975.*

On November 11, 1975, before the denial of certiorari in the instant case, this Court granted certiorari in *Nader v. Allegheny Airlines, Inc.*, No. 75-455, October Term 1975. The question presented there was as follows (See page 2 of *Nader's* Brief for Petitioner):

> "Whether, notwithstanding a statutory provision preserving common law remedies, the Federal Aviation Act requires that the Civil Aeronautics Board be given the opportunity retroactively to approve fraudulent misrepresentations by an airline that would otherwise constitute actionable torts under state common law, with the effect of extinguishing any private right of action arising from such practices?"

In the instant case, the question presented, though it turns on the remedy set forth in Section 1106, may be more simply expressed, as follows: Where the U.S. Court of Appeals has held a rate order invalid and the tariffs based thereon unlawful, is that order void, not voidable within the factual context of this case?

Petitioner seeks to assert a state common law remedy for recovery of all or a portion of monies paid for air transportation based on tariffs expressly held "unlawful" by the United States Court of Appeals for the District of Columbia Circuit. See *Moss et al. v. Civil Aeronautics Board* (C.A. D.C.) 430 F.2d 891 (1970)—*Moss I*. In affirming a final order of the Board in *Moss II*—reported at 521 F.2d 298 (Pet. Appendix A)—the same Court of Appeals did so in a manner which extinguished petitioner's state common law remedy. It did so, notwithstanding Section 1106 of the Federal Aviation Act—its savings clause preserving common law remedies. Moreover, the *Moss II* court did so in a man-

ner quite inconsistent with the decision of this Court in *Atlantic Coast Line R.R. Co. v. Florida* (1935) 295 U.S. 301, 79 L.Ed. 1451.

There, this Court denied restitution to shippers who had paid tariffs under a rate order which, in an earlier case—*Florida v. United States* (1931) 282 U.S. 194, 75 L.Ed. 219—this Court found void. However, in *Atlantic Coast Line,* a narrow majority of this Court held that the rate order was void ". . . solely upon the ground that the facts supporting the conclusion (discrimination against interstate commerce) were not embodied in the (ICC) findings."

After the mandate of reversal, the Interstate Commerce Commission listened to new evidence, made new findings and prescribed the same rates earlier held void in *Florida v. United States,* supra. In *Moss II,* the Court of Appeals sanctioned an almost identical sequence, but within a totally different factual context. It approved a retroactive Board finding that the tariffs held "unlawful" in *Moss I* were not unjust or unreasonable, thereby deciding that Petitioner was not entitled to relief.

It did so by ignoring a decisive factor relied upon by this Court in *Atlantic Coast Line.* On page 312 (U.S.), this Court stated:

> "The Commission was without power to give reparation for the past, *but it was not without power to inquire whether injustice had been done and to make repori accordingly.*" (Emphasis added.)

In *Moss II,* the Court of Appeals examined and relied on only *one,* narrow aspect of "whether injustice had been done," and entirely ignored the illegal actions committed by the Board and the air carriers in connection with the invalid rate order. The record of their joint misconduct shows

beyond any doubt that grave injustice to the fare-paying public was present and pervasive in the proceedings leading up to the adoption by the Board of its invalid rate order of September 12, 1969, and the "unlawful" tariffs based thereon.

On at least three occasions, representatives of the air carriers appeared before the Board in meetings *not open to the public*. They occurred June 16, 1969, July 22, 1969 and August 14, 1969. Transcripts of these hearings appear respectively at pages H 8588-91, H 8592-97 and H 8598-8602, Congressional Record (House) for September 29, 1969.[1] See H 8598 for August 14 letter from John H. Crooker, Jr., Chairman, stating in part: ". . . The meeting will not be open to the public, but the Board intends to make the transcript available publicly immediately upon its receipt." Collectively and individually, these meetings violate 41 C.F.R. 300.2 prohibiting oral communications between the Board, or its members with the air carriers on matters of substance or procedure.

These *ex parte* meetings produced several air carrier proposed formulae, one of which—that of American Airlines—was adopted by the Board as its own in its invalid rate order of September 12, 1969. See pages H 8615 to H 8616, Congressional Record (House) for September 29, 1969. There, in Docket No. 23122, National Airlines, Inc. (National), one of the respondents in the instant case, petitioned for reconsideration of the above rate Order No. 69-9-68. National's position can best be described in its own petition which states in part as follows:

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1. Reference to the Congressional Record (House) represents substantial grounds for applying for a rehearing. Said Record was not available to petitioner until on or about March 2, 1976, and hence, not previously presented under circumstances wherein petitioner could be certain said Record was considered in toto. Petitioner submits that the contents referred to are controlling on the question presented herein. Moreover, the Congressional Record was not presented to the *Moss II* Court in any form.

"All proposals—*including that of American*—have been suspended and set down for investigation because '. . . the Board finds that the proposals may be unjust, unreasonable, unjustly discriminatory, unduly preferential or unduly prejudicial or otherwise unlawful . . .' (Order, p. 3)

"Despite the foregoing conclusion, the Board, at page 6 of the order, states as follows:

> "'We believe that the revenue increase produced by the *American* formula is appropriate as discussed hereafter, and therefore *adopt that formula* for our model . . . .'

"So far, the Board has merely adopted a formula which it has already found to be unjust, unreasonable, etc. Not content with that oddity, the Board, at page 9, produces another:

> "'. . . the Board intends to consider fares produced by the [American] formula as a "just and reasonable" ceiling . . . '

"Thus the circle of illogic is completed with three steps: (1) American's formula is unjust and unreasonable; (2) but the Board adopts it as its own model; and (3), *mirabile dictu,* American's formula becomes a just and reasonable ceiling." (Emphasis in original.)

Thus, we have the extraordinary spectacle of one of the nation's most important regulatory agencies engaging in rate-making by formula from an air carrier to the exclusion of the public interest it was established to protect. As a different panel of the Court of Appeals stated in referring to *Moss I:*

> ". . . the CAB's rate formula (actually American's but adopted by the Board as its own) was the product of behind-the-scenes bartering between the agency and the carriers . . . ." See *Consolidated Edison Co. of N.Y. v. Federal Power Commission* (C.A. D.C.) 512 F.2d 1332, 1342 (1975).

This pernicious conduct and the closed hearings earlier described herein were clearly ignored by the Court of Appeals in *Moss II*. Accordingly, the air carriers must be held to have received the "unlawful" tariffs under such circumstances that they will give offense to equity and good conscience if permitted to retain the funds collected thereunder. Moreover, these tariffs not only sanction, but also reward such misconduct, in that the carriers are thereby awarded a bonus in the form of rates considerably higher than the "lowest reasonable" rates that could be lawfully fixed by the Board (*Federal Power Commission v. National Gas Pipeline Company* (1942), 315 U.S. 575, 585-586, 86 L.Ed. 1037, 1049).

It was not merely the failure to notice and hold the public hearing required by Section 1002(d) of the Federal Aviation Act which made the tariffs "unlawful." It was the collusive misconduct of the Board and the air carriers which so tainted the September 12 rate order with illegality that it must be treated as *void,* not voidable.

In *Atlantic Coast Line,* a narrow majority of this Court felt that a procedural error of the Interstate Commerce Commission and without any fault or misconduct on the part of the carrier provided no basis for restitution. As the majority said: "Void in such a context is the equivalent of voidable." Compare this, however, with the wilful misconduct of the air carriers, acting in concert with the Board, in "a blatant attempt to subvert the statute's (Federal Aviation Act) scheme." *Moss I*, at page 900. Thus, we have a combination of rates fixed without the legally required public hearing and collusion in fixing those rates wherein the equities of the fare-paying public, if they are not protected by this Court, will be left altogether unprotected.

There can be no conceivable basis for relying here on the "purely procedural error" argument urged by respondents in the instant case.

In *Atlantic Coast Line,* the majority did rely on this argument against a vigorous dissent. It (the dissent) stated flatly that the ICC order was null and void and could not justify the carrier in thereafter collecting the higher rates. Thus, for failure of the ICC to include appropriate findings, and without any fault of the carrier, the dissent would have granted restitution on the "last lawful rate" theory.

In the instant case, we find a situation in which the Board, acting in concert with the air carriers, adopted as its own a formula developed by American Airlines, and did so without the legally required public hearing. To treat the September 12, 1969 rate order as voidable under such circumstances is wholly without precedent and not sanctioned by any provision of the Federal Aviation Act.

CONCLUSION

The doctrine of retroactive agency immunization from the consequences of its own violation of the Federal Aviation Act, a violation in which the air carriers knowingly participated, is indeed unknown to the common law. Moreover, it seriously misconstrues the Board's powers and conflicts directly with the preservation of common law remedies explicitly provided for in Section 1106 of the Federal Aviation Act. What the Court of Appeals has done here is to extinguish that remedy by giving legal effect to a *void* order, not one which is merely "invalid."

For the reasons set forth above, as well as those set forth in the petition for writ of certiorari, Petitioner prays

that this Court grant rehearing of the order of denial, vacate that denial, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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